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Refugee Documentation Centre

Country Adoption Pack

PAKISTAN

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Information on the legal requirements/procedures regarding adoption in Pakistan.

Country Advice from the *Australian Refugee Review Tribunal* published in January 2010 notes:

“Pakistan’s legal system is based on the *shariah*, which does not recognise adoption in the legal sense – that is, to establish a parent–child relationship between individuals who are not related by blood. Consequently, there is no statutory provision for adoption in Pakistan. The following excerpt from *The Politics of Adoption* explains the tension between adoption and Islam:

Islam does not, strictly speaking, recognize the term ‘adoption’. In most Islamic states, adoption as it is known in western nations is impossible. Any process that purports to alter family genealogy, to change the authentic identity of an individual and potentially disadvantage ‘legitimate’ children, is generally frowned upon in Muslim culture. Adoption in particular is anathema as it involves the permanent and absolute transfer of parental rights to adoptive parents, a denial of ancestry and falsifying of bloodlines.

(Note: The majority of citations in this research response are drawn from O’Halloran, K. 2009, *The Politics of Adoption: International Perspectives on Law, Policy & Practice*, 2nd edn, Springer, 22 January. The citations have been corroborated by other sources however O’Halloran provides the most

comprehensive and up-to-date account of customary practice. The book dedicates an entire chapter to the adoption process in the Islamic context – a hardcopy is available from Country Advice–Sydney.)

Despite this, Pakistan law enables children to be placed under the guardianship of a suitable individual – as an alternative means of care. In 1994, the Pakistan government provided the following information concerning in-country adoptions, and the situation appears to remain current:

Adoption is not governed by any law in Pakistan/Islam. It does not mean that adoption is literally prohibited in Pakistan. Children in especial circumstances are placed under the guardianship of their near relatives or suitable person appointed by Court. In that case the children do not automatically adopt the parentage of their guardians. They will legally enjoy all social and economic rights except for inheritance of property from their guardian.

(Note: The Pakistan government provided this information to the Committee on the Rights of the Child, in response to issues raised over its implementation of the UN Convention on the Rights of the Child.)” (Australian Refugee Review Tribunal (28 January 2010) *Pakistan: "Country Advice Pakistan PAK36043 – Adoption – Customary adoption – kafala – Guardians and Wards Act 1890"*)

This Country Advice also states:

“In Pakistan, *kafala* defines a system of alternative care that could be considered a form of customary adoption. It provides a model of alternative care that – unlike legal adoption – preserves the blood ties between the child and its biological parents – an acceptable practice under Islam. An excerpt from *The Politics of Adoption* provides a definition of *kafala*:

Kafala is an Arabic legal term for a formal pledge to support and care for a specific orphaned or abandoned child until he or she reaches majority. A form of unilateral contract, it is used in various Islamic nations to assure protection for such minors, as these nations generally do not legally recognize the concept of adoption.

Under *kafala*, children are placed under the guardianship of an individual – always the male in the case of a married couple – through either an informal or formal arrangement:

In Islam what can be termed adoption is at best an alternative care arrangement for a child whose parents have died or are unable to provide the necessary physical care, love and protection. Such children are then cared for by a set of parents or guardians who act as caregivers with the consent, whether written or verbal, from the natural parents or next of kin. Natural parents do not give up their parental rights. Instead, by mutual agreement, they make care arrangements with others for the upbringing of their child.

Kafala appears to take place without the state involvement in certain circumstances, for example between members of an extended family. Put by O’Halloran:

By far the majority of adoptions in Islamic states take the form of informal, long-term, first party, care arrangements (or *kafala*) within the child's extended family and, as there are no placement rights as such, the parties are essentially left to their own devices. In third party domestic adoptions, where all rights in respect of the orphan or abandoned child are vested in the designated government agency, the placement procedure is controlled by that agency.

Kafala is also a practice that has UN recognition under the Convention on the Rights of the Child, to which Pakistan is a signatory:" (Ibid)

This Country Advice also states:

"The Guardians and Wards Act 1890 (originally promulgated under the British system) is relevant to customary adoption in that it formalises the guardian–ward relationship. Under the Act, the relevant district court can issue a guardianship order...

[...]

The Act enables an individual to obtain legal guardianship of a child (a practice consistent with *kafala* but not mandatory). All sources appear to indicate that *kafala* can be done in conjunction with the state, but this is probably more common when an orphanage or third party is involved.

To obtain legal guardianship, an application must be submitted to the relevant district court for consideration. O'Halloran provides an overview of the judicial process in Pakistan:

Generally, domestic adoption arrangements in Islamic states proceed with a minimum of formality. ... In Pakistan, applicants may seek a guardianship order in respect of an orphan or foundling and, as a first step, will be assessed by government officials known as Deputy Commissioners. The assessment will take the form of a home study report accompanied by the usual references and an assessment of their eligibility and suitability to provide a home environment likely to safeguard the welfare of the child concerned. If approved, the child will then be transferred from an orphanage to their care and they will be vested with custody and guardianship rights. If the child's parents are known to the authorities, and the applicants wish to 'adopt', then they will have to enter into an irrevocable, bilateral, intra-familial agreement in writing in which the birth parent/s clearly waive any right to reclaim their child."

Despite the availability of this process, the practice of *kafala* does not appear to stipulate a requirement to legalise guardianship. Moreover, O'Halloran notes that in '*Islamic countries, most domestic adoptions are first party informal care arrangements or kafala and are not necessarily endorsed by court orders.*' Jilani & Associates – a Pakistan-based law firm specialising in family law – also provides the following information:

A guardian can be a de facto or a de jure one. Legal guardians and those appointed by the court are de jure guardians. A father is the natural guardian of a child under the age of 18 years under the GWA [*Guardians and Wards Act 1890*].

As opposed to a de jure guardian, a person, like the mother, brother, uncle, other relations except father and father's father, or an institution like an orphanage, may voluntarily place himself or herself in charge of the person or property of the minor; a mother, however, is the next possible guardian after a father, unless the latter, by his will, has appointed another person as the guardian of the child. She under certain circumstances can appoint a guardian by will. She can do so during the lifetime of her husband if he is incapable of acting; or after his death. A de facto guardian, as opposed to a de jure guardian, is merely a custodian of the person and property of the minor.

Consequently, it would be reasonable to expect that not all 'adoptions' are formalised in Pakistan. However, there is no information to indicate the extent to which either *de jure* or *de facto* guardianship is practised, nor is there any information to indicate which is preferred." (Ibid)

A report from the *UN Committee on the Rights of the Child* published in October 2009 notes under the heading 'Children without parental care':

"The Committee welcomes the project aimed at developing quality care standards for residential childcare institutions and the adoption of the National Policy for the Protection of Orphans and Vulnerable Children in the earthquake-affected areas, but remains concerned that this policy has not been expanded to all areas of the State party. The Committee notes the State party's preference for family forms of alternative care, but remains concerned at the lack of information about informal forms of alternative care and at the poor quality of alternative care institutions and the absence of periodic reviews of placement.

The Committee recommends that the State party undertake the necessary measures to protect the rights of children without parental care and address their rights and their needs, with a focus on:

- (a) Establishing a clear regulation on alternative care for children, including quality care standards, periodic review of placement and the right of the child to be heard during all steps of the procedure;
- (b) Strengthening its promotion of and support for family-type and community-based forms of alternative care for children deprived of parental care, in order to reduce institutional care;
- (c) Providing training for staff in alternative care settings and access to complaints mechanisms for the children;
- (d) Ensuring adequate periodic monitoring of alternative care facilities on the basis of established regulations; and
- (e) Collecting data in order to evaluate alternative care policies;
- (f) Take into account the recommendations of the day of general discussion on children without parental care held at its fortieth session in 2005 (see CRC/C/153).

Kafalah

The Committee notes that the State party applies *kafalah* of Islamic law, which is provided for in article 20 (3) of the Convention, as a form of alternative care, but regrets the lack of information about the regulations that apply to this form of alternative care.

The Committee recommends that the State party develop and implement legislative and other measures, policies and procedures to ensure that children receive care in a manner that fully respects the best interests of the child and the provisions of the Convention, in particular articles 20 and 21.” (UN Committee on the Rights of the Child (15 October 2009) *Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: concluding observations: Pakistan*, p. 12)

The *United States Department of State* Intercountry Adoption Report notes under the heading Hague Convention Information:

“Pakistan is not party to the *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Adoption Convention)*. Intercountry adoptions of children from non-Hague countries are processed in accordance with 8 Code of Federal Regulations, Section 204.3 as it relates to orphans as defined under the Immigration and Nationality Act, Section 101(b)(1)(F).

Adopting a child in Pakistan can be a long, difficult, and legally-complex process. The Guardians and Wards Act of 1890 governs the rights and interests of minors in Pakistan. Pakistani law and Islamic Shari’a law, upon which Pakistan family law is largely based, does not allow for adoptions of Pakistani children in Pakistan. According to Pakistan’s laws, prospective adoptive parents who are non-Muslim may not be appointed guardians of Muslim children, and non-Christians may not be appointed guardians of Christian children. Children abandoned at an Islamic orphanage are deemed Muslim unless there is evidence to the contrary.” (United States Department of State (April 2014) *Intercountry Adoption - Pakistan*)

Under the heading ‘Who Can Be Adopted’ the report states:

“Pakistan has no statutory law on adoptions, but does have a law governing guardianship. Prospective parents should consult a lawyer in Pakistan regarding the guardianship requirements.” (ibid)

A report from *International Social Service - International Reference Centre for the Rights of Children Deprived of their Family* states under the heading ‘Source’:

“Kafalah finds its origin in the Sharia. The Sharia is a set of rules, which governs the life of a Muslim. It is based on different sources, including the Koran, the Sunna (teachings from the Prophet’s life), the Ijma and the Qiyas (collection of case-law), as well as other sources such as customary law, the opinion of savants, the Old Testament, etc. [...]

The prohibition of adoption, as a means to create new filiation bonds, is based on an interpretation of two verses of Sura N° 33 of the Koran and is seen by Sharia law as a falsification of the natural order of society. It is declared haram (forbidden) in order to preserve blood ties as the only way of creating filiation. The preservation of inheritance rights and the protection of the surname also play an important role in Muslim social traditions. [...]

However, the Koran gives an important place to orphans and to their protection; it values the care of an orphan in one's home. The child should be treated as a biological child, but he/she is not entitled to the same rights as the latter (in particular the name and inheritance). Thus, kafalah is the model proposed by the Sharia in this respect." (International Social Service - International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC) (December 2007) *Fact Sheet N° 51 Specific case Kafalah*)

Under the heading 'Different practices in different countries' the report notes:

"As the Muslim world is very diverse, the following examples illustrate the fact that it is necessary to put any kafalah decision in its national context in order to understand its meaning. A special focus is put on the potential "international" aspect of a kafalah.

a) Countries with strict application of a 'non international kafalah': Iran, Mauritania, Egypt.

They reject kafalah at the international level, based on a strict interpretation of the Sharia and rejecting all equivalence between kafalah and adoption. Thus, abandoned children only have limited possibilities to leave their country in order to benefit from a placement abroad, except by relatives. At national level, child placements in non-biological families exist, but remain very limited or outside the legal framework (for example, traditional family placements)."

b) Countries with a 'case-by-case' solution: Morocco, Algeria, Jordan and Pakistan. They estimate that the situation of children deprived of family and the lack of national applicants for kafalah is such that it may be necessary to allow international kafalah, as long as the applicants respect some of the procedural conditions for a kafalah (for example, the conversion to Islam). [...]

- In Pakistan, according to law, non-Muslim children may be adopted by non-Muslim applicants, whether nationals or foreigners. However, it is very difficult to find evidence of this practice and to know how the procedures are dealt with. (Ibid)

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